Filed 8/25/15 P. v Johnson CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JOHNSON, Defendant and Appellant.	A142514 (Napa County Super. Ct. No. CR163499)

Appellant Michael Johnson sexually assaulted A.C. in her car when she drove him home after dinner at a restaurant. He was sentenced to 12 years in prison after a jury convicted him of forcible rape, two counts of forcible sexual penetration, misdemeanor battery as a lesser included offense of forcible sodomy, and false imprisonment. (Pen. Code, §§ 236, 242, 243, subd. (a), 261, subd. (a)(2), 289, subd. (a)(1)(A).)[1] Appellant argues the jury instructions lightened the prosecution's burden of proof beyond a reasonable doubt by stating that a dating relationship was not enough by itself to prove consent to a sexual act. He also contends his trial attorney provided ineffective assistance

[1] The sentence consisted of the six-year middle term for rape and the six-year middle term term for one of the sexual penetration counts, which the court, in its discretion, made fully consecutive under Penal Code section 667.6, subdivision (c). Sentences on the remaining sexual penetration count and on the battery were ordered to run concurrently, and the sentence for false imprisonment was stayed under Penal Code section 654.

of counsel by failing to ask the court to excuse a juror who, during deliberations, was approached by a stranger who told her a damaging story about appellant. We affirm.

BACKGROUND

The prosecution presented the following evidence at trial.

A. had met appellant years before and had recently begun communicating with him after they connected on the dating Web site Plenty of Fish. They had not yet gone on a date though they had discussed getting together. On July 27, 2012, A. went to a restaurant with her two friends, Ashley and Michelle, and discovered appellant was there as well with a friend of his. Appellant and A. decided to have dinner together and their friends left the restaurant before they did. The two of them shared part of a pitcher of margaritas, but neither of them got drunk.

A. found appellant to be narcissistic and immature and decided she was not interested in him. In the parking lot outside the restaurant, appellant pulled her toward him and groped her backside. A. pushed him away and said he shouldn't grab women like that because "it's a very small valley and people might get the wrong idea." Appellant asked for a ride home because his friend had driven him there. A. agreed.

Appellant became "agitated" in the car and told A. she was a woman who liked to tell people what to do. A. kept quiet because she realized the conversation was becoming "really weird." She stopped on a dimly lit street when appellant told her his house or car was "right here." Appellant attacked her by twisting her breast, grabbing her by the back of her hair, positioning her over the armrest, and crawling over her. He reached under her dress and put his fingers inside her vagina and anus as she pleaded with him to stop. A. inadvertently urinated because she was frightened and appellant said, "That's right, bitch, piss on my cock." He put his penis in her anus and she screamed in pain. Appellant put his finger in A.'s mouth and pulled her head back to control her screaming.

A. decided to change her demeanor to defuse the situation, so she told appellant he was hurting her and asked him to allow her to get more comfortable. Appellant stepped out of the car when she told him she needed more room. A. told appellant (falsely) that

she needed to pick up her infant daughter because it was getting late and told him to call her later. Appellant retrieved his shoes, giving her a kiss through the driver's side window and promising to call. A. allowed the kiss because she was afraid.

A. drove to her friend Ashley's house and told her she had been raped. She was hysterical, wet with urine, and her hair was a mess, but she did not appear intoxicated. Ashley took A. to the police station to report what had happened. She described the sexual assault to Officer Michael Fullmore, who noted that she smelled of urine and alcohol but did not appear intoxicated. Officer Michael Moore, who was also present, described A. as "calm to crying" and did not notice any objective signs of intoxication.

A. was taken to the hospital for a sexual assault examination on the night of the assault, which revealed "a plethora of genital injuries" consistent with a sexual assault. A photo taken by Officer Jack Thompson at the hospital showed abrasions on A.'s left thigh and left knee and a bite mark on the back of her shoulder. A swab taken from the bite mark "revealed a major contributing DNA profile matching that of [A.C.] and a minor contributing profile that is consistent with the reference DNA profile of [appellant]. This minor evidence profile is estimated to occur at random in the population among unrelated individuals with a frequency of approximately one in 15 million African-Americans, one in a hundred sixty thousand for Caucasians, and one in 4.6 million for Hispanics."[2]

The next day, Angela showed up at her friend Michelle's house where she took a shower and changed into some clothes she had just purchased. She seemed "frail, very quiet, very reserved, very vulnerable, which she generally is not." Michelle saw a bite mark on A.'s back.

With the assistance of the police, A. made a recorded pretext call to appellant a few days later. During the call she told him she was not on birth control and asked him whether he had used a condom and whether he had even penetrated her. He said he had but he "didn't finish" and joked about her car being small. A. told appellant she had been crying and had asked him to stop and he said he didn't remember that. She asked

[2] Appellant is Caucasian.

appellant why he had bitten her back and treated her like he did and he said he was "just getting a little kinky." He denied raping her and said she had urinated because he had penetrated her vagina with his finger. Appellant told A. "a lot of women like stuff like that" and asked her, "Can I make it up to you? Let's have a nice evening sometime to make it up, a nice relaxing evening."

The defense did not call any witnesses, but counsel argued that A. was not credible as a witness and that the sexual contact had been consensual.

DISCUSSION

A. *Instructions Regarding Dating Relationship and Consent*

Appellant was convicted of one count of forcible rape and two counts of forcible sexual penetration, each of which required the prosecution to prove the lack of consent as an element of the offense. (See *People v. Ireland* (2010) 188 Cal.App.4th 328, 336; see *In re Asencio* (2008) 166 Cal.App.4th 1195, 1204-1205.) He contends the jury instructions given in this case deprived him of due process by shifting to the defense the prosecution's burden to prove the lack of consent. We disagree.

CALCRIM No. 1000, the standard jury instruction defining rape, provided in relevant part: "To consent, a woman must act freely and voluntarily and know the nature of the act. [¶] Evidence that the defendant and the woman dated is not enough by itself to constitute consent." CALCRIM No. 1045, the standard instruction on sexual penetration, provided: "In order to consent, a person must act freely and voluntarily and know the nature of the act. [¶] Evidence that the defendant and the other person dated is not enough by itself to constitute consent." Appellant argues that by advising the jury a dating relationship was insufficient to establish consent, these instructions were "tantamount to a directed verdict" on the charged sexual offenses.[3]

[3] Although appellant did not object to these instructions, we review his claim on the merits under Penal Code section 1259, which allows an appellate court to "review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (*People v. Johnson* (2015) 60 Cal.4th 966, 993.)

The language challenged by appellant tracks Penal Code section 261.6, which provides: "In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, 'consent' shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. [¶] A current or previous dating or marital relationship shall not be sufficient to constitute consent . . . . [¶] Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent."

In *People v. Gonzalez* (1995) 33 Cal.App.4th 1440 (*Gonzalez*), the court considered and rejected a similar challenge to CALJIC No. 1.23.1, which, like CALCRIM Nos. 1000 and 1045, advises the jury that a current or previous relationship does not itself establish consent. The court reasoned: "CALJIC No. 1.23.1 did not shift the burden of proof on consent to the defense or create a presumption of lack of consent. The instruction merely defined consent." (*Gonzalez*, at p. 1443.) We agree with the rationale of *Gonzalez*.

CALCRIM Nos. 1000 and 1045 correctly informed the jury that a dating relationship is not "sufficient" to constitute consent. Instead, a dating relationship is just one piece of evidence for the jury to consider, along with all the other evidence adduced at the trial, to determine if the sexual acts at issue were consensual. The jury was not precluded from considering the existence of a dating relationship between appellant and A. in resolving the issue of consent, nor was it advised to presume a lack of consent. The instructions did not understate the prosecution's burden of proof or shift that burden to the defense, and they did not resemble a directed verdict in any way.

B. *Failure to Excuse Juror No. 6*

Appellant contends his trial attorney provided ineffective assistance of counsel because he did not challenge a juror who was contacted by a third party during deliberations and heard prejudicial information about an incident in appellant's past. Again we disagree.

1. Proceedings Below

The jury retired for deliberations at approximately 3:56 p.m. on the afternoon of November 21, 2013, and adjourned at approximately 5:00 p.m. When jurors arrived at the courthouse the following morning, Juror No. 6 advised the bailiff she wanted to tell the court about an issue that had arisen the night before. After being instructed to describe the issue in writing, she drafted the following note: "Last night I was approached in a restaurant by a person who recognized me from the jury selection pool. [¶] He proceeded to tell me a story/anecdote about the defendant that could be considered prejudicial."

In proceedings held outside the presence of the other jurors, Juror No. 6 explained that the previous night she had met her husband for dinner at a restaurant and was talking with some friends in the bar area. A man approached her and asked if she was on jury duty that week, indicating he had seen her at the courthouse. She said something to the effect of "Oh, yeah, lucky me" and tried to turn back to her friends, but the man said he had known appellant in high school and had gotten into a fight with him because appellant had "groped" the man's then-girlfriend at a party. Juror No. 6 told the man he shouldn't have said anything to her and turned away, and he said he had been hoping that he would get called to the jury voir dire so he could say something in the courtroom about the incident. Asked if she had shared this information with other jurors, Juror No. 6 said no, and explained that she had just informed them someone told her something she shouldn't have heard and she might not be able to deliberate.

The court asked Juror No. 6 whether her experience would affect her ability to be fair and impartial and she replied, "I mean I—I think I could ignore it. I think I kind of—we deliberated for some time yesterday, and I feel like I had already kind of formed my—my feelings on the charges. And so I don't think that necessarily is going to affect my feelings about the case. Asked again whether she could put the information aside, Juror No. 6 responded, "I mean it's hard to say whether it's going to be—I mean I heard

it, so it's—" The court interjected, "It's hard to unring the bell," and the juror agreed, "It's hard to, yeah, put it back in the box."

In response to questions by defense counsel, Juror No. 6 stated that she believed the man who approached her worked in the restaurant and that she had started thinking the night before that she would need to advise the court about what happened. "[I]t's one of those things where you don't want people to talk to you, and they feel the need to like say something." Asked whether she could put the information aside during deliberations, she stated, "I think I can put it aside and focus solely on what I've heard in this case." Asked whether she could inform the court if she returned to deliberations and discovered she could not put the external information aside, she answered affirmatively. Asked whether she could be fair and impartial, she responded, "I think I can. I take this seriously. I mean in thinking about whether I should, you know, go through this and say something, or I—if it were my family, or myself, I would want to be sure that this is an impartial jury." She reaffirmed that she believed she could be impartial.

Based on these comments, and outside of Juror No. 6's presence, defense counsel indicated he wanted to keep her on the jury. Appellant joined in counsel's decision. Defense counsel stated, "Your Honor, if I could just say for the record, I've discussed the matter with my client. I have told him that it is my opinion that she should be kept as a juror, and he's had time to consider that." Appellant confirmed he had been given time to consider the matter and did not want Juror No. 6 to be discharged.

The court, in summarizing Juror No. 6's responses, stated, "[T]here was a pause initially in her comments, but the more she talked, the more I—I observed sort of a resolve that I'm not going to—I'm going to follow the instructions, I'm not going to let this impact my determination one way or the other, and I think it came across as credible." Juror No. 6 returned to the courtroom and the court advised her: "First of all, you handled this perfectly, so I want to thank you for doing that. You did exactly what you were expected to do. [¶] And long story short, the—we have concluded that we

believe you can continue to be fair and impartial, and so you're going to stay on the jury. . . . [¶] Remember, though, the admonition. You're not to discuss any of this with the other jurors. You're just back in the jury room, and you guys can resume your deliberations." Juror No. 6 did not communicate any further with the court, and the jury reached its verdict at approximately 12:48 p.m. that same day.

2. Analysis

Appellant agreed with defense counsel's decision to retain Juror No. 6, and affirmatively indicated he had discussed the matter with his attorney and had been given sufficient time to consider the issue. His challenge to counsel's competence is therefore barred by the doctrine of invited error, which " 'operates . . . to estop a defendant from claiming ineffective assistance of counsel based on counsel's acts or omissions in conformance with the defendant's own requests.' " (*People v. Majors* (1998) 18 Cal.4th 385, 409 (*Majors*) [defendant's agreement with counsel's recommendation to forgo jury instructions on lesser offense and force the jury to make all-or-nothing decision precluded him from challenging decision as ineffective assistance].) We would also reject appellant's argument on its merits.

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694.)

"Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To

the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' " (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.) Whether to challenge or seek the discharge of a juror is generally a tactical decision entrusted to defense counsel. (See *People v. Staten* (2000) 24 Cal.4th 434, 454 [defendant failed to show there could be no valid tactical reason for failing to exercise peremptory challenges against certain jurors]; *People v. Ochoa* (1998) 19 Cal.4th 353, 447 [counsel not ineffective in failing to challenge for cause a juror who had been assaulted as a teenager but who indicated she could be impartial]; *People v. Jones* (1998) 17 Cal.4th 279, 310 (*Jones*) [counsel's decision not to challenge juror's continued service after brief contact with victim's mother in court cafeteria was tactical choice]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1101 [defense counsel's agreement to substitute alternate juror after return of partial verdict was "tactical decision well within the perimeter of counsel's authority"].)

Juror No. 6 did not engage in any misconduct and was exposed to the extraneous information about appellant through no fault of her own. She came forward immediately to disclose the incident, indicated she had given the matter some thought, and assured the court and counsel she could be fair and impartial. Juror No. 6 stated she had already formed her feelings about the charges and did not think hearing the unfavorable information about appellant would change these feelings, a comment defense counsel might reasonably have interpreted to mean that Juror No. 6's feelings were favorable to the defense. And, even assuming that was not the case, it was reasonable for defense counsel to conclude that a juror who had been conscientious enough to come forward with the information about the third party contact and answer questions in a forthright manner would be scrupulous about considering the case from the defense point of view.

In *Majors*, *supra*, 18 Cal.4th at pages 425-428, the defendant's accomplice in a capital case had been shot in Arizona a month after the triple homicide from which the charges arose. The jury had been shielded from this information, but one juror sitting on the case overheard a customer in a convenience store state that the defendant's accomplice had been killed in Arizona. Asked by the court whether he had drawn any conclusions about the accomplice's death after hearing the comment in the store, the juror said, "Well, I've tried to separate that and not think about it anymore. But, you know, the natural thought that keeps coming to mind is: Well, who would have reason to make sure that he didn't, you know, live? And that would be, you know, obvious—Obviously [the defendant]. But I— [¶] I would probably not give any credence to that natural assumption or anything else or—Because he's obviously a drug dealer; it could have been a multiple thing." (*Id*. at pp. 426-427.) The juror went on to assure the court he understood there were many reasons and ways the accomplice could have died and the assumption about appellant's possible involvement was "one [he] tried to put out of [his] mind and say, well, there's a possibility that it could have been. And just because that's one didn't mean that—That's the one that is the truth." (*Id*. at p. 427.) Defense counsel told the court the juror was one he would "hate to lose," and stated that he believed the juror was "bright enough to be able to separate what he hears from the outside from that in the courtroom." (*Ibid*.)

The Supreme Court rejected the defendant's argument on appeal that counsel had been ineffective in failing to challenge the juror, stating it "ha[d] no basis for second-guessing trial counsel's tactical decision to leave [the juror] on the jury." (*Majors*, *supra*, 18 Cal.4th at p. 428.) Similarly, we will not second-guess the decision by appellant's trial counsel to leave Juror No. 6 on the jury when nothing in the record before us suggests that tactical decision was unreasonable. (See *Jones*, *supra*, 17 Cal.4th at p. 310; *People v. Lucas* (1995) 12 Cal.4th 415, 486-487 [no ineffective assistance in forgoing challenge to juror who had been approached by third party during the trial who wanted to

discuss the case; juror had promptly terminated conversation, told court about the incident, and assured the court the conversation did not affect her thinking about the case].)

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.